

AN AGENCY GUIDE TO THE SERVICEMEMBERS CIVIL RELIEF ACT

by Mark E. Sullivan

[Mr. Sullivan is a retired Army Reserve JAG colonel, a board-certified specialist in family law and a fellow of the American Academy of Matrimonial Lawyers who practices in Raleigh, NC. The chairman of the Military Committee of the ABA Family Law Section, Sullivan is the author of *The Military Divorce Handbook* (ABA 2006). Comments or questions should be sent to: mark.sullivan@ncfamilylaw.com.]

INTRODUCTION

Congress amended the Soldiers' and Sailors' Civil Relief Act (SSCRA) in December 2003 to apply to all local, state or federal agency proceedings; previously civil courts had been the sole concern of the Act since its passage in 1940. The new statute is called the Servicemembers Civil Relief Act (SCRA). With this new focus and coverage, it is obvious that a quick training session is essential for administrative law judges, hearing officers and the attorneys who guide and advise agencies, boards, commissions and other administrative entities.

The Act is found at 50 U.S.C. App. § 501 *et seq.* Courts have generally construed the SSCRA liberally to protect those in uniform, and the same should be true with the SCRA. The U.S. Supreme Court has said that the statute should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). This Guide highlights some of the issues related to the impact of military service on administrative hearings, financial obligations and other matters.

QUESTION AND ANSWERS

1. Who is covered under the SCRA?

Pursuant to 50 U.S.C. App. § 511, covered servicemembers include -

- >Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. § 101(d)(1);
- >Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. 502(f) to respond to a national emergency declared by the President and supported by federal funds; and
- >Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

The protections cover, in addition to civil courts, all administrative agencies of the United States, of a state or within a state. 50 U.S.C. App. § 511(5). Does this mean the Pottstown, Nevada City Council? The North Carolina Department of Economic and Community Development? The federal Environmental Protection Agency? The answer is YES to all the above!

2. Can an agency render a decision against a SM?

Under 50 U.S.C. App. § 521, when the SM has not entered an appearance before the agency, administrative law judge, referee, hearing officer, board, commission or other entity (hereafter "agency"), a default decision may not be entered against him without appointing an attorney for him. A default decision, called a "default judgment" in the Act, is any decision or ruling which is adverse to the SM's interest. This might be a ruling

against Sergeant John Doe, the servicemember, in an employment security commission hearing, an order that he remove and replace a hazardous porch railing by a county housing agency, a decision on how much child support he must pay by a state child support hearing officer, or a decision to terminate a contract with him by the Department of Housing and Urban Development.

When a party to an agency proceeding is in the military, the agency must stay the proceeding for at least 90 days (upon application of the SM or his attorney or on the agency's own motion) if the agency determines that:

- there may be a defense to the action which cannot be presented without the SM's presence, or
- after due diligence, appointed counsel has been unable to contact the SM or otherwise determine if a meritorious defense exists.

If a decision is entered against SGT Doe during his period of service or within 60 after it ends, the agency must reopen the matter to let him defend if:

- he was materially affected due to military service in asserting a defense, and
- he has a meritorious or legal defense to the action or some part of it, so long as
- the application is filed within 90 days after the end of military service 50 U.S.C. App. § 521(g).

3. How can the agency find out if a party is in the military?

To find out whether a party is in the military, the agency may apply for information to the Department of Defense (DOD), which must issue a statement as to military service. The office to contact is:

Defense Manpower Data Center [Attn: Military Verification]
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

The easiest way to obtain this information is through the Internet. To do this, go to the DMDC website for SCRA inquiries, <https://www.dmdc.osd.mil/owa/scra/home>, and enter the last name and Social Security number of the individual. These are mandatory entries; the form on the main page also asks for a first name, middle initial and date of birth (DOB), which will help with the search. Further information is available on the "Help" section of this website.

To execute a report, click on the "LookUp" button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

"Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty."

The report is signed by the DMDC Director.

If the Social Security number is unavailable, the requester may request by mail a manual search, using

the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

4. What does “enter an appearance” mean? That term is usually associated with courts, not administrative agencies.

Alas, there is no answer to this in the SCRA. Quite likely, it was never even contemplated when the SCRA was passed, since the SCRA’s predecessor, the SSCRA, applied only to civil courts, not administrative agencies. Look to agency cases and precedent for any definitions or interpretations of “entry of appearance” which may apply to your agency. As a general guide, these three inquiries may help focus, if not answer, the problem. Based on the rules of “entry of appearance” in court procedures, the first inquiry would be:

- Has the SM initiated the administrative procedure?

A SM seeking to obtain a governmental benefit, such as one who is seeking a permit for home improvements, who bids on a government contract, or who applies for a license to practice law, is a party who has made an appearance because he or she recognizes the authority of the agency to grant or withhold the benefit sought. Acknowledgment of the tribunal’s authority is the essence of the concept of “general appearance” in courts of law, and it should have the same meaning in administrative tribunals. One cannot apply for a benefit while, at the same time, deny the agency’s jurisdiction to grant that benefit. Examples of those who claim a benefit or privilege include individuals who hold business or professional licenses, as well as motor vehicle licenses, tags or registration. This logic also applies to those who obtain the benefit or privilege through succession or purchase, such as a property right of way or a septic tank permit through purchase or inheritance of the land involved.

- Has the SM filed a motion or request in the administrative proceeding?

Sometimes the SM did not start the proceedings but wants to become a party; this might occur if the SM moved to intervene in an ongoing proceeding. It would also include the request of the SM to add or dismiss a party, to disqualify the hearing officer, or to adjourn the proceedings.

- If the SM is a respondent in the administrative proceeding (i.e., not the movant), has he or she responded in a way that acknowledges the agency’s authority to render a decision?

In court decisions, the issue of “general appearance” for a defendant usually rests on whether that party has responded to the petition or complaint with a motion or other pleading asking for some form of relief (continuance, dismissal of the claim, more specific statement, discovery, etc.) or else has replied by specifically denying the court’s power over him or her. The same set of rules should apply for agencies, even if the response is no more than a letter or personal appearance at a hearing, since “pleadings” are much more the province of the courtroom than the administrative tribunal. Examples would include a letter responding to an agency’s discrimination complaint, to a notice of a public nuisance penalty hearing, or to a state bar disciplinary notice. A response to the assessment of a fine, and a request for modification of an order or remission of a penalty are other examples.

Note that the concept of “appearance” is not based on the issue of whether the SM has voluntarily located within the territorial jurisdiction of the agency, or whether he or she conducts activities in that venue. These may be important jurisdictional issues, but they do not raise or resolve the issue of whether the SM has entered an appearance before the agency. The common-sense way of determining whether Sergeant John Doe has entered an appearance is to ask if he is “a player” in the proceedings or if he has not yet begun to participate.

5. How is the agency supposed to appoint an attorney for the SM? That’s something courts do, not agencies.

Once again, there is no answer in the SCRA. Quite possibly, the agency lacks the power to appoint attorneys for those appearing before it. The best solution is to solicit the help of a volunteer attorney, possibly a former JAG officer, an attorney who is a military retiree, or a JAG Reservist or Guardsman, to assist in carrying out this duty. No one knows whether this SCRA requirement of the appointment of counsel will turn out to be a federal duty, imposed by Congress and overriding by preemption any agency limitations – yet another example of an “unfunded mandate.”

6. What does Section 522 of the Act say about a SM who has received notice of the action or proceeding?

A. When the SM has received notice of the action or proceeding and has filed an application for a stay, the Act states that the agency may upon its own motion, and shall upon the SM’s application, enter a stay of proceedings for at least 90 days if the motion includes the information required by the statute. 50 U.S.C. App. § 522. This checklist shows the essential elements:

√	Elements of a Valid 90-Day Stay Request. Does the request contain...
	A <u>statement</u> as to how the SM’s current military duties materially affect his ability to appear...
	and stating a date when the SM will be available to appear?
	A <u>statement</u> from the SM=s commanding officer stating that the SM=s military duty prevents his appearance...
	and stating that military leave is not authorized for the SM at the time of the statement?

There is no requirement that any of the above be in the form of an affidavit. A letter, a formal memo, a handwritten note, a motion, or even an e-mail message would suffice.

The SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. 50 U.S.C. App. § 522(d)(1).

If the agency refuses an additional stay, then the statute requires the appointment of an attorney to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2). Unfortunately, the Act is silent on where the agency gets the power to appoint an attorney, what the attorney’s duties are and how to pay the attorney. This is but one example of questions with no answers. The SCRA is a tough statute to adapt to administrative procedures, since it has been written primarily for application in civil courts all the way back to its original passage at the start of World War II. Who is the plaintiff with an agency proceeding, for example? What is "default judgment" in agency terms? How does a commission "appoint a lawyer?" How does a board order the posting of a bond? Does the SCRA amount to an enabling statute that gives, by federal law, these powers to the agency?

Almost certainly the initial duty of the appointed attorney is to renew the request for a stay of proceedings. It will be virtually impossible for him or her to prepare and present the case without the assistance of the unavailable SM.

7. Is the additional stay mandatory or discretionary?

The additional stay is discretionary; to grant it, the agency must find that the member's ability to prosecute or defend is “materially affected” due to his active duty service. Once this finding is made, the SM is entitled to a stay until the material effect is removed. While this is not explicitly stated in the SCRA, it was the rule with the SSCRA and most likely will be the rule under the current Act as well. Finally, since agencies are reluctant to grant long-term stays of proceedings, they can and should require members to act in good faith and be diligent in their efforts to appear before the agency.

Here are some questions and comments which may be helpful in evaluating an additional stay request:

- How much leave has SGT Doe accrued? Ask for a copy of his LES (Leave and Earnings Statement) to find out. Note that members from all branches of military service, whether buck private or rear admiral, get thirty days' leave annually, accruing at the rate of 2.5 days per month (although military necessity may limit when the leave may be taken).
- What is the nature of the "military necessity" that prevents a hearing? Is SGT Doe serving in Iraq, where he cannot be given leave and may be facing hostile fire on a daily basis? Or is he serving as "backfill" at Ft. Bragg so that others may deploy overseas, working a comfortable day shift of 7:30 – 4:30 with weekends off?
- Is SGT Doe's presence necessary? What about video depositions or telephone testimony? Is anyone truly "unavailable" any more? In *Massey v. Kim*, 455 S.E.2d 306 (Ga. Ct. App. 1995), the SM asked for a stay of proceedings to delay pending discovery until the completion of his overseas tour of duty. The court denied his request, pointing out improvements in modern communications since the passage of the SSCRA. See also *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981) and *In re Diaz*, 82 B.R. 162, 165 (Bankr. Ga. 1988) (concerning depositions in place of a personal appearance).

8. What is "material effect"?

There is no single definition of "material effect." The agency should make a finding of "material effect" when a SM's ability to prosecute or defend is impaired by military duties which prevent the member from appearing before the agency or from assisting in the preparation or presentation of the case. An adverse material effect might also be found when military service impairs substantially the SM's ability to pay financial obligations.

9. Can a default decision be rendered when the SM is absent?

When the member has not "made an appearance," 50 U.S.C. App. § 521 governs this issue. Once the agency determines that an absent or defaulting party is in military service, then no default can be taken until an attorney has been appointed to represent the member; see Question 5 above as to appointment issues. If no attorney is appointed, then the default decision is voidable.

10. Suppose a default decision has been rendered against Sergeant John Doe. What must he do to reopen the default decision?

The SCRA allows Sergeant Doe to seek the reopening of a default decision if:

- He applies to the agency for relief, and he shows that he has a meritorious or legal defense in the underlying case;
- The decision was rendered when he was on active military duty or within 60 days thereafter;
- He applies while on active duty or within 90 days thereafter; and
- He proves that, at the time of the decision, he was prejudiced in his ability to defend himself due to military service.

11. Does the SCRA require that a breach have occurred before protections become available?

No. The Act doesn't require breach or default before offering protections to covered individuals. The anticipatory relief provision is set out in 50 U.S.C. App. §591(a):

A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief— (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or (2) from a tax or assessment falling due before or during the servicemember's military service.

“Court” includes administrative agencies.

These anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support, when a prospective breach is likely. For example, when the SM is earning more in his civilian job before mobilization than he will be earning on active duty, and the civilian wage garnishment will terminate upon his call to active duty, the SM should use this section to request a reduction in child support from the support hearing officer or administrative law judge, and to request a new garnishment from DFAS (Defense Finance and Accounting Service) to pay the other party on a timely basis.

12. Can SGT John Doe, our hypothetical servicemember, waive his rights?

A waiver of SCRA rights is only effective if it is made during the period of military service. In addition, certain waivers must be made in writing (in 12-point type or larger). If the agency wants his waiver of the right to request a stay so that the matter may proceed with a clear record that he has knowingly and voluntarily given up his SCRA rights, this form should suffice:

WAIVER OF RIGHT TO REQUEST STAY OF PROCEEDINGS

I acknowledge that I have the right to request a stay of proceedings in this matter under the Servicemembers Civil Relief Act. The stay of proceedings, or continuance, would postpone a hearing in this matter if it were granted. I hereby waive and give up the right to a stay of proceedings. I want to proceed with this matter.

(signature)

Date:_____

Sergeant John Doe

[here print acknowledgment and notarization if required]

13. Are there any other resources regarding the SCRA?

Start with a visit to the home page of the Army JAG School, <http://www.jagcnet.army.mil/TJAGLCS>. When you get there, click on "TJAGLCS Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Servicemembers Civil Relief Act Guide," written by the faculty of the Army JAG School in 2006.

You should also visit the Servicemember's Civil Relief Act information center at the public preventive law page of the Army Judge Advocate General's Corps, found at <http://www.jagcnet.army.mil/legal>.

(rev. 3/27/07)